**Opinion issued August 25, 2011**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-10-00490-CV**

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**CITY OF DEER PARK, Appellant**

**V.**

**JOSE IBARRA, EMILIO VARGAS, MARIO TORRES, JOSE LEMUS, ROBERTO DELGADO, SANTIAGO BRAVO, CARLOS VASQUEZ, HUGO MARTINEZ, SUAL BALSECA, VINCENTE MARTINEZ, AND LUIS IBARRA, Appellees**

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**On Appeal from the 165th Judicial District Court**
**Harris County, Texas**
**Trial Court Case No. 2010-03312**

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## MEMORANDUM OPINION

In this interlocutory appeal,[1] appellant, the City of Deer Park ("the City"), challenges the trial court's order denying its plea to the jurisdiction on the breach of contract, tort, equitable, and statutory claims made against it by appellees, Jose Ibarra, Emilio Vargas, Mario Torres, Jose Lemus, Roberto Delgado, Santiago Bravo, Carlos Vasquez, Hugo Martinez, Saul Balseca, Vicente Martinez, and Luis Ibarra (collectively, the "workers"). In its sole issue, the City contends that the trial court erred in denying its plea to the jurisdiction in which it asserted that the workers have not asserted a claim against the City for which its governmental immunity is waived.

We affirm in part and reverse in part.

## Background

In their Second Amended Petition, the workers allege that in 2009, the City, after soliciting public bids, contracted with Bay Utilities, L.L.C., a general contractor, for the construction of a new roadway and parking lot for the City's Fire Training Field. In accordance with the bid specifications, Bay Utilities, in order to ensure performance under the agreement, obtained a "Performance and Payment Surety Bond" from First National Insurance Company of America (the "payment bond insurer") in the amount of $122,650.38. Bay Utilities then contracted with a subcontractor, Evenflow Services, L.L.C. ("Evenflow"), to

[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (Vernon 2008).

perform the work described in the contract with the City. Evenflow then contracted with the workers to do the required labor, which they performed on the project from June to November 2009. However, the workers only received payment for approximately one and one-half of a month's work. And, despite repeated requests for payment, the workers did not receive payment for the total amount of their work.

On December 4, 2009, the workers, seeking payment of their unpaid wages in the amount of $55,397.50 and attorneys' fees in the amount of $5,300, sent a demand letter to Bay Utilities, Evenflow, and the payment bond insurer, but not to the City. David Long, the president of Bay Utilities, and Royce Choate, the president of Evenflow, then informed the workers that because they had "hired an attorney and opted to exercise their rights under the law," their "services with Evenflow and Bay Utilities were no longer required and [their] jobs were terminated."

On December 8, 2009, Long informed the workers' attorney that he had been "unaware that [Evenflow] had failed to pay the workers until he received the demand letter." Two days later, Long signed an "Affidavit of Bills Paid" in support of a request for payment from the City, representing that, "All just and lawful invoices against [Bay Utilities] for labor, materials and expendable equipment employed in the performance of the contract [] have been paid in full

. . . prior to acceptance of payments from the [City]," "no claims have been made or filed upon the payment bond," and Bay Utilities "has not received any claims or notice of claims from the subcontractor, materialman's and suppliers."

Based on Long's affidavit, the City, on January 12, 2010, issued payment to Bay Utilities in the amount of $63,792.22 for completion of the project. Subsequently, Bay Utilities, on January 19, 2010, sent the workers a letter containing calculations made by Evenflow, which showed that it owed the workers thousands of dollars for their labor.

The workers then filed the instant suit against the City, Bay Utilities, Long, Evenflow, Choate, and the payment bond insurer.[2] The City then filed its plea to the jurisdiction, asserting immunity as a bar to the workers' breach of contract, tort, equitable, and statutory claims.

**Standard of Review**

An appeal may be taken from an interlocutory order that grants or denies a plea to the jurisdiction filed by "a governmental unit." TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (Vernon 2008); *id.* § 101.001(3)(D) (Vernon 2011). We review de novo a trial court's ruling on a jurisdictional plea. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). When

[2] The City of Deer Park is the only defendant in this appeal.

reviewing a trial court's ruling on a plea, "we first look to the pleadings to determine if jurisdiction is proper, construing them liberally in favor of the plaintiffs and looking to the pleader's intent," and "we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised." *City of Waco v. Kirwan*, 298 S.W.3d 618, 621–22 (Tex. 2009); *see also Tex. Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001) ("[W]e consider the facts alleged by the plaintiff and, to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties."). In considering this evidence, we "take as true all evidence favorable to the nonmovant" and "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Kirwan*, 298 S.W.3d at 622 (quoting *Miranda*, 133 S.W.3d at 228).

A "pleader must allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *City of Houston v. Rushing*, 7 S.W.3d 909, 913 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). It is proper for a trial court to dismiss claims over which it does not have subject matter jurisdiction but retain claims in the same case over which it has jurisdiction. *Thomas v. Long*, 207 S.W.3d 334, 338–39 (Tex. 2006). That is, a trial court is not required to deny an otherwise meritorious plea to the jurisdiction concerning some claims because the trial court has jurisdiction over other claims. *Id.* at 339.

## Governmental Immunity

In its sole issue, the City argues that the trial court erred in denying its plea to the jurisdiction because the workers' complaint "arises out of the City's performance of a governmental function" and they failed to plead a "legislative waiver of governmental immunity" to assert their claims against the City.

Governmental immunity protects political subdivisions of the state, including cities, from lawsuits for money damages, unless such immunity has been waived.[3] *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Governmental immunity, like sovereign immunity, involves immunity from suit and immunity from liability. *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 n.2 (Tex. 2008) (explaining that "both types of immunity afford the same degree of protection"). Immunity from suit is jurisdictional and bars suit, whereas immunity from liability is not jurisdictional and protects from judgments. *Harris Cnty. Hosp. Dist.*, 283 S.W.3d at 842.

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[3] Although the terms sovereign immunity and governmental immunity are often used interchangeably, sovereign immunity "extends to various divisions of state government, including agencies, boards, hospitals, and universities," while governmental immunity "protects political subdivisions of the State, including counties, cities, and school districts." *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Casualty Joint Self-Insurance Fund*, 212 S.W.3d 320, 324 (Tex. 2006).

When governmental immunity is waived by the legislature, the legislature must use clear and unambiguous language indicating its intent do so. *See Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010); *Harris Cnty. Hosp. Dist.*, 283 S.W.3d at 842. A plaintiff bears the burden to affirmatively demonstrate the trial court's jurisdiction by alleging a valid waiver of immunity, which may be either a reference to a statute or to express legislative permission. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999).

A municipality, like the City, has immunity only for its governmental acts, not its proprietary acts. *East Houston Estate Apartments., L.L.C. v. City of Houston*, 294 S.W.3d 723, 730 (Tex. App.—Houston [1st Dist.] 2009, no pet.). In the Texas Tort Claims Act, the legislature has noted that governmental functions "are those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public." TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon 2011). On the other hand, a proprietary act is an act performed by a municipality in its discretion, primarily for the benefit of those within its corporate limits rather than for the general public. *Id.* § 101.0215(b). The legislature has expressly stated that governmental functions include fire protection, street construction and design, and parking facilities. *Id.* § 101.0215(a)(1), (25), (31).

***Breach of Contract Claims***

In regard to the workers' breach of contract claims, the City argues that the workers have not met their burden of affirmatively demonstrating the trial court's jurisdiction by alleging a valid waiver of immunity because they have not alleged a breach of contract claim against the City, the City did not breach its contract with Bay Utilities, and the City did not waive its immunity by conduct.

In their Second Amended Petition, the workers assert that the City "has a duty in the public interest to properly administer the contracts it signs with its general contractors and subcontractors by developing contractual conditions and guidelines that ensure proper administration and management of those contracts and ensure laborers and suppliers are paid accurately and on time." They further assert that the purpose of the City's contract with Bay Utilities "was to benefit those within the corporate limits of the municipality" and "not the interest of the residents of Texas or the public at large." They thus conclude that the City entered into its contract with Bay Utilities "in the exercise of its proprietary functions," and argue that because the City "was not acting as an agent for the State of Texas, as the benefits of the contract it entered into were not for the public in general, the City is not immune from tort or contract liability."

In support of their conclusion, the workers rely upon *Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex. 2006). They point us to the supreme court's use of the following language:

> A municipality is not immune from suits for torts committed in the performance of its proprietary functions, as it is for torts committed in the performance of its governmental functions. But we have never held that this same distinction determines whether immunity for suit is waived for breach of contract claims, and we need not determine that issue here.

*Id.* The court, however, explained that such a distinction was not necessary in the case before it because the legislature had expressly included the type of services contracted for in that case, i.e., waste removal, as among a municipality's governmental functions for purposes of tort liability. *Id.* at 343–44. The court noted that the "Texas Constitution authorizes the [l]egislature to 'define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law.'" *Id.* (citing TEX. CONST. art. XI, § 13). The court then concluded, "[W]e see no reason to think that the classification would be different under the common law. Thus, even if the City were not immune from suit for breach of a contract whose subject lies within its proprietary functions, the [plaintiffs'] contract does not qualify" because the legislature had already determined that such functions were governmental. *Id.* at 344.

This Court and several other courts of appeals have subsequently applied the governmental-proprietary dichotomy in breach of contract cases. *See Temple v. City of Houston*, 189 S.W.3d 816, 821 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("Because the City was performing a proprietary function in providing insurance for its employees, the City does not have sovereign immunity."); *see also City of Emory v. Lusk*, 278 S.W.3d 77, 83 (Tex. App.—Tyler 2009, no pet.) (holding that "due to the City's immunity [under Texas Civil Practice and Remedies Code section 101.0215], the Lusks are precluded from filing a suit for breach of contract"); *City of Houston v. Petroleum Traders Corp.*, 261 S.W.3d 350, 355 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (examining *Tooke* and stating, "Even assuming for argument's sake that the dichotomy does apply to PTC's contract claim, the fuel purchases at issue here are a governmental function"); *City of Weslaco v. Borne*, 210 S.W.3d 782, 791–92 (Tex. App.—Corpus Christi 2006, pet. denied) (analyzing breach of contract claim with "assumption that the proprietary-governmental dichotomy extends to breach of contract claims").

Here, similar to the court in *Tooke*, we note that the legislature has expressly included "police and fire protection and control," "street construction and design," and "parking facilities" as governmental functions, which encompass the services the City contracted for with Bay Utilities. Accordingly, we conclude that the City

was performing a governmental function when it entered into its contract with Bay Utilities.

Having so concluded, we must determine whether the workers have otherwise affirmatively demonstrated the trial court's jurisdiction by alleging a valid waiver of immunity. The legislature has expressly waived the governmental immunity from suit of local governmental entities for certain contract claims:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV'T CODE ANN. § 271.152 (Vernon 2005). The statute defines a "[c]ontract subject to this subchapter" as "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." *Id.* § 271.151(2).

In their petition, the workers assert that they are "direct and third party beneficiaries" to the contract between the City and Bay Utilities and the contract between Bay Utilities and Evenflow. Thus, the workers conclude that the legislature has waived the City's immunity "by operation of law." The City argues that there is no waiver of immunity because there is no contractual relationship between the City and the workers and the City did not breach its contract with Bay

Utilities. The workers respond that Texas Local Government Code section 271.151(2) provides for the waiver of the City's immunity in this case because it entered into a contract for "goods or services" and the workers are "direct and third party beneficiaries to the contracts" at issue.[4]

In its reply brief, the City argues that its plea to the jurisdiction shifts to the workers the burden of supporting their claim with factual allegations, there is a presumption against third party beneficiary agreements, and it owes no burden to produce the contract to negate the workers' claims of third party beneficiary status. It then argues that because the workers' allegations regarding their third party beneficiary claim are conclusory, the workers did not satisfy their burden to plead facts—rather than conclusions —to support their claim as required by *Miranda*. *See Miranda*, 133 S.W.3d at 226; *see also City of Pasadena v. Kuhn*, 260 S.W.3d 93, 95 (Tex. App.—Houston [1st Dist.] 2008, no pet.). But the City did not raise this argument in its original brief or in its plea to the jurisdiction. Because it was not raised in the trial court, the workers were never given an opportunity to amend their petition to include specific facts supporting this claim. *See Miranda*, 133 S.W.3d at 226 (plaintiffs should be allowed to amend petition in response to plea to jurisdiction to allege sufficient facts to affirmatively

[4] The City does not contend that the waiver of governmental immunity in section 271.152 of the Texas Government Code cannot be invoked by a third-party beneficiary.

demonstrate the trial court's jurisdiction); *see also Tex. Dep't of Trans. v. Olivares*, 316 S.W.3d 89, 107 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (remanding to allow plaintiffs reasonable opportunity to amend their pleadings relative to jurisdictional issue raised for first time on appeal).

The pertinent contracts are not part of the record in this appeal. It is well-settled that third-party beneficiary claims succeed or fail according to the contract upon which a suit is brought. *Union Pacific R.R. Co. v. Novus Intern., Inc.*, 113 S.W.3d 418, 421 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Greenville Ind. Sch. Dist. v. B & J Excavating, Inc*., 694 S.W.2d 410, 412 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). Because the record does not include a copy of the pertinent contracts, it is "impossible for us to determine what liabilities and obligations, if any, are described therein." *B & J Excavating, Inc*, 694 S.W.2d at 412. Accordingly, construing the workers' pleadings liberally in their favor, as we must, we hold that the trial court did not err in denying the City's plea to the jurisdiction on the workers' claim for breach of contract.[5]

***Quantum Meruit and Promissory Estoppel Claims***

The City argues that the trial court erred in not dismissing the workers' equitable claims against it because the legislature has not waived the City's governmental immunity from quantum meruit and promissory estoppel claims.

[5] We note that the workers, on appeal, make no argument in support of the trial court's denial of the City's plea to the jurisdiction on their remaining claims.

In their Second Amended Petition, the workers assert that the City "waived immunity from suit by entering into and accepting the benefits of the contract which applies to a proprietary function." However, they make no specific allegations regarding waiver of immunity as to their quantum meruit and promissory estoppel claims. Rather, in regard to these claims, the workers merely "incorporate by reference" certain preceding paragraphs of their petition. The workers' pleadings must affirmatively demonstrate, either by reference to a statute or express legislative permission, that the legislature consented to suit on their claims. *Jones*, 8 S.W.3d at 638. Absent such consent to suit, a trial court has no jurisdiction over the claims. *Id.* We construe the workers' "incorporat[ion] by reference" as an assertion that immunity is waived "by operation of law" or by conduct because the City contracted with Bay Utilities.

As noted above, the legislature has waived governmental immunity from suit for local governmental entities when they enter into certain contracts. *See* TEX. GOV'T CODE ANN. § 271.152. However, this Court has held that section 271.152's waiver of immunity does not include claims founded in quantum meruit. *City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4, 13 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (section 271.152 waives sovereign immunity only for breach of contract and "lists no other claims, either in law or in equity"; therefore, section 271.152 does not apply to claims for quantum meruit ); *see also H & H Sand &*

*Gravel, Inc. v. City of Corpus Christi*, No. 13-06-00677-CV, 2007 WL 3293628, at *3 (Tex. App.—Corpus Christi Nov. 8, 2007, pet. denied) (mem. op.) (holding that claims in equity, including waiver by acceptance of material and benefit and detrimental reliance, are not encompassed by section 271.152's limited waiver). Furthermore, section 271.152(2) defines a "contract subject to this subchapter" as a "written contract." Because a claim for promissory estoppel is not a claim on a written contract, immunity is not waived under section 271.152 for such a claim. The workers' promissory estoppel and quantum meruit claims sound in equity, and they are simply not included in section 271.152's limited waiver of governmental immunity. *See Swinerton Builders, Inc.*, 233 S.W.3d at 13.

In their Second Amended Petition, the workers also assert that the City waived immunity from suit by "entering into and accepting the benefits of the contract," thus waiving its immunity "by conduct and by operation of law." Although the supreme court has not specifically approved of waiver of immunity by conduct, this Court has held that a governmental entity may waive its immunity by conduct. *Tex. S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 908 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *see also Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 706 (Tex. 2003) (stating that while some circumstances might warrant recognizing waiver by conduct, such exception did not exist under facts). In *State Street*, this Court found that the governmental entity

"lured" the plaintiff into a lease with false promises that a contract would be valid and enforceable, then disclaimed any obligation on the contract by taking the position that it was not valid after all. 212 S.W.3d at 908. We characterized the situation as involving "extraordinary factual circumstances" that warranted recognition of a waiver of immunity by conduct. *Id.*

In the instant case, however, there are no such "extraordinary factual circumstances." There is no allegation that the City lured the workers into performing their jobs with false promises. Although under certain circumstances a governmental entity may waive its immunity by conduct, "the equitable basis for such waiver simply does not exist under this set of facts." *See Catalina Dev., Inc.*, 121 S.W.3d at 706. Accordingly, we hold that the trial court erred in denying the City's plea to the jurisdiction as to the workers' quantum meruit and promissory estoppel claims.

***Negligent Administration of Contract***

The City argues that the trial court erred in not dismissing the workers' "negligent administration of contract" claims against it because the legislature has not waived the City's governmental immunity from such a tort claim under the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.025.

In alleging their claim for negligent administration of contract against the City, the workers, in their Second Amended Petition, assert that the City is not

immune from tort liability because it was performing a proprietary function when it executed its contract with Bay Utilities. However, as noted above, the City's action were governmental in nature, not proprietary. *See id.* § 101.0215(b); *Tooke*, 197 S.W.3d at 343.

Alternatively, the workers argue that the legislature has waived the City's immunity under the Texas Tort Claims Act because the City, in the public interest, has a duty to hire and properly train employees that will develop contractual conditions and guidelines to ensure the proper administration and management of the contracts it enters with general contractors and subcontractors that ultimately control the use of tangible property. The workers assert that they were injured by the City's "negligent administration of a contract, that ultimately controlled the use of tangible and real property" resulting in the workers being "left unprotected."

The Texas Tort Claims Act waives a governmental entity's immunity from suit on all claims for which it waives immunity from liability. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.025. It provides a limited waiver of immunity for: (1) property damage, personal injury, and death caused by the negligence of an employee if it arises from the operation or use of a motor-driven vehicle or equipment and (2) *personal injury and death* so caused by a condition or *use of tangible personal or real property*. *Id.* § 101.021 (Vernon 2011). The pleadings in this case, however, do not implicate any such waiver. The workers do not allege a

premises-defect claim or that they were injured as the result of the use of publicly owned automobiles. The workers allege only that the City negligently administered its contract, resulting in their not receiving payment. The workers can only assert such a claim against the City if the legislature has expressly granted them consent to so sue. Neither the workers pleadings nor the record demonstrates any such consent. Accordingly, we hold that the trial court erred in denying the City's plea to the jurisdiction on the workers' negligent administration of contract claim.

***Statutory Claims***

The City argues that the trial court erred in not dismissing the workers' various statutory claims against it because the legislature, in the statutes relied upon by the workers, has not waived governmental immunity.

The workers cite several provisions under which they are suing the City for failure to pay them funds. As noted above, a plaintiff bears the burden to affirmatively demonstrate a trial court's jurisdiction by alleging a valid waiver of immunity, which may he may do by either referencing a statute or noting express legislative permission. *Jones*, 8 S.W.3d at 637. Legislative consent to sue the State must be expressed in "clear and unambiguous language." *IT-Davy*, 74 S.W.3d at 854.

Here, the workers generally allege a claim against all of the defendants for violating Chapter 61 of the Texas Labor Code, asserting that the defendants "are Texas business entities covered by the Texas Payday Act." However, the "Payday Act" expressly does not apply to governmental or political subdivisions of this state. TEX. LAB. CODE ANN. § 61.003 (Vernon 2006); *Igal v. Brightstar Info. Tech. Group, Inc*, 250 S.W.3d 78, 82 n.2 (Tex. 2008).

The workers also allege a claim against all of the defendants for violating Chapter 62 of the Texas Labor Code by failing to pay minimum wage, asserting that the defendants "are Texas business entities covered by the Texas Minimum Wage Act." However, the legislature has not waived governmental immunity for such a claim and the workers have not demonstrated that the legislature has given them specific consent to bring a suit against the City.

Additionally, the workers allege a claim against all of the defendants for violating Chapter 2258 of the Texas Government Code, asserting that the defendants failed to pay them, as workers employed under a contract to construct a public work, the general prevailing rate of per diem wages for similar work in the locality. TEX. GOV'T CODE ANN. § 2258.021 (Vernon 2008). However, nothing in Chapter 2258 indicates the legislature's intent to clearly and unambiguously waive the City's immunity from such a suit. In fact, Chapter 2258 provides a procedure to proceed to arbitration and states that "such arbitration decision is final." *Id.*

Moreover, the workers have failed to demonstrate that the legislature has given them consent to bring such a suit. Accordingly, we hold that the trial court erred in denying the City's plea to the jurisdiction as to the workers' statutory claims.

We overrule the portion of the City's issue challenging the trial court's order denying its plea to the jurisdiction on the workers' breach of contract claim. We sustain the portion of the City's issue challenging the trial court's order denying its plea to the jurisdiction on the workers' tort, equitable, and statutory claims.

## Conclusion

We affirm the portion of the trial court's order denying the City's plea to the jurisdiction on the workers' breach of contract claim. We reverse the portion of the trial court's order denying the City's plea to the jurisdiction on the workers' tort, equitable, and statutory claims and render judgment dismissing these claims.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Brown.